CLASSIC LANE (M) SDN BHD

v.

CITIBANK MALAYSIA (L) LTD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB SAID J
[SUIT NO: D8-22-3219-1999]
11 MARCH 2005

EXCHANGE CONTROL: *Finance regulations - Banking securities - Plaintiff executed security documents in favour of defendants in order to obtain loan agreement - Whether approval of Bank Negara Malaysia necessary for security documents - Whether security documents fell within ambit of "securities" under Exchange Control Act 1953 - Exchange Control Act 1953, ss. 2, 4(2), 11*

CIVIL PROCEDURE: *Striking out - Grounds for - Application by defendants under O. 18 r. 19 Rules of the High Court 1980 to determine whether approval of Bank Negara Malaysia necessary for security documents - Whether O. 33 r. 2 Rules of the High Court a more suitable procedure - Whether application inherently defective - Whether defendants could avail themselves of this summary procedure*

This was an appeal by the defendants against the decision of the senior assistant registrar dismissing the 1st and 2nd defendant's application to strike out the plaintiff's amended statement of claim with costs. The plaintiff had obtained an USD15 million term loan from Public Bank (L) Ltd ('PB'), and specific approval of an offshore term loan facility from Bank Negara Malaysia ('BNM'), the controller of foreign exchange. Under the terms of the offshore term loan facility, the second instalment payment was due on 31 October 1996. BN and PB agreed to a deferred repayment schedule, payable to the 1st defendant. The 1st defendant issued a letter of offer for USD14,375,000 ('the 1996 term loan facility') to refinance the outstanding sum under the existing USD15 million granted by PB. A loan agreement in respect of the 1996 term loan facility exclusively to fully repay the existing indebtedness to PB was executed. Various securities were required under the loan agreement and the 2nd defendant was constituted a security agent. A redemption sum of USD14,385,696.42 as at 31 December 1996 was remitted by the 1st defendant to PB after receiving a request from the plaintiff for a drawdown, settling in full the entire existing indebtedness.

Under the loan agreement, the final bullet instalment of RM11,875,000 was due and payable on 31 October 1999. When this sum remained unpaid as at 20 December 1999, the 1st defendant, *via* a letter to the plaintiff, declared that, pursuant to the loan agreement, an event of default had occurred and accordingly all sums payable became due and payable without need of further demand or notice. The plaintiff, on the other hand, sought a declaration that the 1996 term loan facility and the security documents were void and illegal. The plaintiff also sought to restrain the defendants from exercising any rights thereunder, including the appointment of a receiver and manager pursuant to a debenture dated 20 February 1997. At the outset, the plaintiff, relying on O. 33 r. 2 of the Rules of the High Court 1980 ('the RHC'), raised the issue that this summary procedure should not apply and that this application ought not to be entertained by this court. The defendants, however, submitted that the sole issue for determination in this case was whether, pursuant to the Exchange Control Act 1953 ('the ECA'), the approval of BNM was necessary for the security documents, and that this was a simple question of law that could be determined by an application under O. 18 r. 19 of the RHC.

Held (allowing the defendants' appeal and striking out the plaintiff's suit):

[1] Even though O. 33 r. 2 of the RHC was a more suitable procedure to determine the issue of whether or not BNM approval was necessary, the fact that the defendants sought to have that issue determined under O. 18 r. 19 of the RHC did not render their application inherently defective. Either way the question of law would totally predispose the need of a trial since it would be plain and obvious that once the point had been argued, there could only be one result that would justify the use of O. 18 r. 19 of the RHC. The issue was fairly straightforward and did not require any protracted or minute examination of any documents nor did it call for an analysis of any facts or the application of the law to the facts. The defendants could avail themselves to this summary procedure. (p 210 f-g)

[2] Despite the plaintiff's assertion that the security documents were within the ambit of the definition of "securities" under the ECA, foreign currency and gold do not embrace or extend to securities. Therefore, the granting of the securities to the 2nd defendant did not fall within the purview of s. 4(2) of the ECA. Further, the debenture dated 20 February 1997 created by the plaintiff in favour of the 2nd defendant as a security agent and trustee for the 1st defendant was clearly a banking type of debenture, and did not fall within the ambit of s. 11 or any other provisions under Part IV of the ECA. (pp 212 a & 214 f)

[2a] The defendants had effectively argued and shown that the security documents did not fall within the definition of securities as envisaged under s. 2 of the ECA. It followed that s. 11 of the ECA was not applicable. The Hansard of the ECA Bill makes it clear that the purpose behind the enactment of the ECA was to control the movement of currency, gold and other financial instruments as between scheduled territories. It relates to securities that are issued, transferable and tradeable, and was not aimed at banking securities since they are one-off instruments that can neither be transferred nor traded. Thus, the approval of BNM was not required in relation to the security documents executed by the plaintiff. (p 216 a-b)

Case(s) referred to:

American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors [1990] 1 MLJ 91 ***(refd)***

Arab Malaysian Finance Bhd v. Meridian International Credit Corporation Ltd London [1993] 4 CLJ 307 SC ***(refd)***

Banque Nasionale de Paris v. Wuan Swee May [2000] 4 CLJ 387 HC ***(refd)***

Bumiputra Malaysia Finance Ltd v. Datuk Syed Kechik Syed Mohamed & Ors (CS23-1988-86) (Unreported) ***(refd)***

Chor Paik Har v. Farlim Properties Sdn Bhd [1994] 4 CLJ 285 FC ***(refd)***

Drummond-Jackson v. British Medical Association [1970] 1 WLR 688 ***(refd)***

Hubbuck & Sons Ltd v. Wilkinson [1988] 1 QB 86 ***(refd)***

Lie, Ren-Shuenn v. Lee, Chu-Pin [1999] 2 CLJ 35 HC ***(refd)***

Smith & Croft (No 2) [1987] 3 All ER 909 ***(refd)***

Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd [2003] 2 CLJ 177 CA ***(refd)***

Veetak Enterprise Sdn Bhd v. The Kuala Lumpur Finance Bhd [1987] 1 MLJ 407 ***(refd)***

Williams & Humbert Ltd v. W & H Trade Marks (Jersey) Ltd [1986] AC 368 ***(refd)***

Legislation referred to:

Companies Regulations 1966, rr. 19, 24

Exchange Control Act 1953, ss. 2, 4(2), 11

Rules of the High Court 1980, O. 18 r. 19, O. 33 rr. 2, 3, O. 56 r. 1(3A)

For the plaintiff - Henry Quah; M/s Haniff & Rajendran

For the defendants - RS Nathan (Ned Segaram with him); M/s Shearn Delamore & Co

Reported by Suresh Nathan

JUDGMENT

Abdul Wahab Said J:

The plaintiff sought a declaration that the Term Loan Facility of 26 December 1996 and the Security Documents are void and illegal. The plaintiff also sought to restrain the defendants from exercising any rights thereunder, including the appointment of a Receiver and Manager pursuant to the Debenture dated 20 February 1997. The defendants appealed against the decision of the SAR on 17 April 2000, dismissing the 1st and 2nd defendant's application to strike out the plaintiff's amended statement of claim with costs.

Factual Matrix

The 1st defendant is a licenced offshore bank in Labuan, wholly owned by Citibank N.A., U.S.A. The 2nd defendant is incorporated in Malaysia and a wholly owned subsidiary of Citibank N.A. In September 1993, the Kuala Lumpur Branch of Citibank N.A. agreed to arrange USD15 million to be secured by a Standby Letter of Credit given by the Hong Kong Branch of Citibank N.A.

The 'in principle' approval of Bank Negara Malaysia (controller of Foreign Exchange) was obtained on 23 November 1993 for an offshore loan from a financial institution based in Labuan. Public Bank (L) Ltd. made the USD15 million term loan available to the plaintiff. Eventually, the parties agreed that the Standby Letter of Credit be provided by the Singapore Branch of Citibank N.A. instead of the Hong Kong branch. A specific approval of the offshore Term Loan Facility was obtained from Bank Negara on 22 December 1993.

Under the terms of the Offshore Term Loan Facility, the second instalment payment was due on 31 October 1996. Discussions on arranging for a re-financing of the facility had gone on since early to mid 1996.

The parties agreed that Bank Negara approval be sought for the refinancing and deferment of the principal sum for 12 months. On 4 October 1996 Bank Negara agreed to the refinancing by the 1st defendant of the existing offshore Term Loan Facility. On 9 October 1996, Bank Negara agreed to a deferred repayment schedule. The revised schedule is in three instalments, all payable to the 1st defendant. Instalment payments of USD1,250,000 are payable on 31 October 1997 and one bullet instalment of USD11,875,000 is payable on 31 October 1998.

On 15 October 1996, Public Bank (L) wrote to say that it agreed to the refinancing and deferment of the 2nd instalment from 31 October 1996 to 27 December 1996. On 19 October 1996, the 1st defendant issued a Letter of Offer for USD14,375,000 (1996 Term Loan Facility) to refinance the outstanding sum under the existing US15 million granted by Public Bank (L).

On 26 December 1996 a loan agreement in respect of the 1996 Term Loan Facility exclusively to fully repay the existing indebtedness to Public Bank (L) was executed. Various securities were required under the loan agreement and the 2nd defendant was constituted a security agent. A redemption sum of USD14,385,696.42 as at 31 December 1996 was remitted by the 1st defendant to Public Bank (L) after receiving a request from the plaintiff for a drawdown. This settles in full the entire existing indebtedness to the plaintiff.

Under the loan agreement, the final bullet instalment of RM11,875,000 was due and payable on 31 October 1999. By various letters, the 1st defendant agreed for the payments to be extended from 31 October 1999 to 30 November 1999 and from 30 November 1999 to 15 December 1999. The extension of time was given pending negotiations for restructure of a 1996 loan whilst reserving its right under the Offshore Term Loan Facility.

The 1st defendant by a letter of 8 December 1999 offered to restructure the 1996 loan subject to fulfillment of certain conditions precedent and accepted by the plaintiff. The plaintiff failed to fulfill the preconditions of the 1st defendant's letter of offer. On 17 December 1999, the 1st defendant extended the performance of pre conditions to 20 December 1999 that the plaintiff nevertheless failed to fulfill.

The conditional restructuring of the 1996 Off-Shore Term Loan Facility lapsed. The sum of USD11,875,000 remained unpaid as at 20 December 1999. The 1st defendant by letter dated 30 December 1999 to the plaintiff declared pursuant to cl. 14.02 of the loan agreement an event of default under cl. 14.01 had occurred and accordingly all sums payable became due and payable without need of further demand or notice.

At the outset counsel for the plaintiff raised the issue that this summary procedure should not apply and placed reliance on O. 33 r. 2 RHC, and that this court ought not to entertain the application. He referred to *Arab-Malaysian Finance Bhd v. Meridien International Credit Corporation Ltd London* [1993] 4 CLJ 307. In this case by consent of the parties, certain issues were raised for determination as preliminary issues on points of law under O. 33 r. 2.

Reference was also made to *Veetak Enterprise Sdn Bhd v. The Kuala Lumpur Finance Bhd* [1987] 1 MLJ 407 where Gunn Chit Tuan J (as His Lordship then was) said that "it is only in plain and obvious cases that recourse can be had to the summary process under that rule, and if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under Order 33, rule 2 ...".

Counsel for the defendants submitted that the sole issue for determination in this case is whether or not the approval of Bank Negara Malaysia ('BNM') was necessary for the Security Documents. This is a simple question of law which can be determined in an O. 18 r. 19 application.

The power to strike out under O. 18 r. 19 RHC is only to be exercised in plain and obvious cases and where the claim is manifestly unsustainable. The plaintiff's case is indeed manifestly unsustainable and that this is a plain and obvious case calling for the exercise of the power to strike out the plaintiff's claim.

He went on to say that even though in *Veetak Enterprise*, Gunn Chit Tuan J noted that if there was a point of law which requires 'serious discussion', then O. 33 r. 2 procedure should be invoked. The case before me is not one involving a point of law which requires 'serious discussion'. The only issue is whether or not BNM approval was required for the Security Documents. As Gunn Chit Tuan J himself noted, a point of law can only be said to require 'serious discussion' where what is required is a minute and protracted examination of the documents and the facts of the case to see if the plaintiff has a cause of action.

The issue of whether or not the approval of BNM was required does not require any minute and protracted examination of the documents or any analysis of the facts of the case. There is no necessity to apply any propositions of law to any facts. Nor is it necessary to call any witnesses. I find it is also common practice for parties to apply to strike out a suit under O. 18 r. 19 RHC on grounds which include a determination of an issue of law. Such issue includes limitation and *res judicata*.

In *Lie, Ren-Shuenn v. Lee, Chu-Pin* [1999] 2 CLJ 35 in a striking out under O. 18 r. 19 RHC Jeffrey Tan J held that "the sole issue raised in this appeal, entirely one of law, should be decided without the rigmarole of a full trial ..." The determination of this issue if decided in favour of the defendants, would totally predispose of the plaintiff's claim and obviate the need for a trial.

The interrelationship between O. 33 r. 2 and O. 18 r. 19 RHC has been explained by Lord Templeman in *Williams & Humbert Ltd v. W&H Trade Marks (Jersey) Ltd* [1986] AC 368. His Lordship adopted *Hubbuck & Sons Ltd v. Wilkinson* [1988] 1 QB 86 where it was pointed out, in considering the distinction between O. 18 r. 19 and O. 33 r. 3 that the former was appropriate in 'plain and obvious cases.' As to what is 'plain and obvious', Lord Templeman took note of the statement in *Drummond-Jackson v. British Medical Association* [1970] 1 WLR 688 at 700 that "The question whether a point is plain and obvious does not depend upon the length of time it takes to argue. Rather the question is whether, when the point has been argued, it has become plain and obvious that there can only be but one result."

In *Smith v. Croft (No. 2)* [1987] 3 All ER 909 Knox J recognized that the issue of law to be determined in that case ie, whether or not the plaintiff minority shareholder had *locus standi* to bring an action on behalf of the company, could have been determined under either O. 33 r. 3 or O. 18 r. 19. To this he said "In my judgment, as a matter of procedural law, either O. 18 r. 19 or O. 33 r. 3 is a potentially possible vehicle for such an application as is involved in the present case to decide whether a plaintiff minority shareholder has the necessary *locus standi*. But for present purposes, it is sufficient for my decision to hold, as I do, that the procedure under O. 18 r. 19 is not of itself an impossible procedure which leads to an application made under that rule or under the inherent jurisdiction to be struck out as being evidently improper."

Even though O. 33 r. 2 is a more suitable procedure to determine the issue of whether or not BNM approval was necessary, the fact that the defendants seek to have that issue determined under O. 18 r. 19 does not render the defendants' application inherently defective. Either way the question of law would totally predispose the need of a trial as it would be plain and obvious that once the point had been argued there can only be one result which would justify the use of O. 18 r. 19. The issue is fairly straightforward and does not require any protracted or minute examination of any documents and does not call for the analysis of any facts or the application of law to facts. The defendant could avail itself to this summary procedure.

Before this appeal was heard by me, the defendants had filed an application to adduce fresh evidence under O. 56 r. 1(3A) of RHC. The fresh evidence are 2 letters:

(i) letter dated 11 August 2000 from 2nd defendant to BNM requesting confirmation that approval of BNM not necessary for the Security Documents intemized.

(ii) Letter dated 16 August 2000 from BNM to 2nd defendant in reply to the above letter that BNM has no objection to the utilization of securities owned by residents and non residents as security or collateral for the loan granted to the plaintiff.

I allowed the application to introduce these letters which were issued after the striking out application had been heard by the SAR.

Question For Determination

The sole question for determination of the court is whether pursuant to the Exchange Control Act 1953 ('ECA') and Exchange Control of Malaysia ('ECM') 10 the approval of BNM was necessary before execution of the Security Documents. If so required, whether it had been duly obtained.

The plaintiff's course of action is for a declaration that the Term Loan Facility dated 26 December 1996 together with its security documents are null and void. Prior approval of BNM is required before execution of the term loan and security documents particularly the debenture and legal charge. Learned counsel for plaintiff said that adopting the principles governing interpretation of statutes, the said security documents are within the ambit of the definition of "securities" under the ECA and ECM 1. He referred to ss. 2, 4 and 11 of the ECA and paras. 4, 5, 6 under ECM 10.

Learned counsel for the defendants contends that pursuant to the ECA and ECM 10, no approval from BNM in relation to the granting of security documents was needed in the first place. There is no requirement under the ECA for controller's approval for security under s. 4 ECA.

> Section 4(1): "Except with the permission of the Controller, no person, other than an authorized dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorized dealer."
>
> Section 4(2): "Except with the permission of the Controller, no person resident in the scheduled territories, other than an authorized dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency to, any person outside Malaysia."

Foreign currency and gold do not embrace or extend to securities. Therefore the granting of securities to the 2nd defendant does not fall within the purview of s. 4(2) of the ECA. It is also not an act preparatory to buying or borrowing gold or foreign currency to, any person outside Malaysia. In *American Express Sdn Bhd v. Dato' Wong Kee Tat & Ors* [1990] 1 MLJ 91 at p 95, it was held that the signing of the guarantee in Malaysia is not "an act which is preparatory" within the meaning of s. 4(2) of the ECA nor is the prior permission of the controller required before signing the guarantees under that section.

Taking of securities is not 'dealing' under s. 4 ECA. This is because 'dealing' in s. 4 of the ECA does not include the issuance of a guarantee. The defendants referred to *Bumiputra Malaysia Finance Limited v. Datuk Syed Kechik bin Syed Mohamed & Ors* CS23-1988-86 (unreported) and *Arab Malaysian Finance Bhd v. Meridian International Credit Corporation Ltd London* [1993] 3 MLJ 193 in support of this argument.

There is no requirement for approval under ECM 10. Paragraph 4 of ECM-10 says that: "The prior permission of the controller is required for a resident to obtain credit facility which do not comply with the provisions in para. 2." The term "credit facilities" in ECM 1 "means any advance, loan, trade financing, hire purchase factoring, leasing facilities, redeemable preference shares is sued to non ordinary shareholders, guarantee, or similar facility in whatever name or form, other than ..." From the definition I agree that the creation or taking of securities does not come within such a definition. Therefore para. 4 of the ECM 10 is not applicable to the granting of securities in the present case.

While the learned counsel for plaintiff submits that the Security Documents are within the ambit of the definition of 'securities' under the ECA and/or ECM, the learned counsel for defendants contends that the expression "securities" has two different and distinct meanings in everyday usage. The first meaning" 'securities' is used in conjunction with and as an umbrella or collective reference to instruments such as stocks, bonds, debentures, debenture stocks, bills of exchange and promissory notes. They are all transferable and negotiable and are property or evidence of title to property. The second meaning refers to a limited right over property or a chose in action that is created in order to secure the payment of a loan. This covers common commercial security such as charges over land, guarantees, pledges and assignments as well as debentures.

The Hansard for the legislative proceedings leading to the passing of the Exchange Control Ordinance 1953 shows that "Securities" in Part IV of the ECA refers to the first meaning. The Security Documents in our case, being security for banking facilities is wholly out of the scope of section 11 and Part IV of the ECA. It follows that debentures taken as security for banking facilities are also excluded.

He then went on and submitted that there are two types of debentures. The first type is a debt instrument issued by companies to the public to raise capital. This type of debenture has to be registered under the Companies Act 1965 ("CA"). The issuance of a trust deed and the appointment of a trustee usually accompany it. Under rr. 19 to 24 of the Companies Regulations 1966 ("Regulations"), a debenture holder has a right to call meetings of debenture holders to enforce their rights. Whereas the second type of debenture is either a fixed or a floating charge created in favour of a lender to secure banking facilities. It only needs to be registered in the Register of Charges under s. 108 of the CA. It does not carry with it the right to call for meetings. It is typically enforced by the appointment of a Receiver and Manager.

Debenture in the definition of securities in s. 2 of the ECA refers to a debenture as a debt instrument backed up by a trust deed and conferring rights on holders. It is not the banking security type of debenture. Excluding the latter type of debenture would remove any inconsistency in s. 11. It is inconceivable that the legislature would exclude charges, guarantees, assignment, etc, but not such debentures.

The meaning of 'debenture' under s. 4 of the CA is not automatically applicable to the word 'debenture' in s. 2 of the ECA. The two statutes, ECA and CA have different purposes. Thus 'debenture' in the two statutes carries different meanings.

Learned counsel for the defendant then referred to *Syarikat Tingan Lumber Sdn Bhd v. Takang Timber Sdn Bhd* [2003] 2 CLJ 177, where the Court of Appeal said "To this, we refer of course to the time honoured guidelines of contextual interpretation housed in the maxim of *noscitur a sociis* which was explained by Gajendragadkar J in the case of *The State of Bombay v. Hospital Mazdoor Sabha* AIR [1960] SC 610 at p. 613 as follows:

It is, however, contended that, in construing the definition, we must adopt the rule of construction *noscitur a sociis*. This rule, according to Maxwell, means that, when two or more words which are susceptible of analogous meaning are coupled together they are understood to be used in their cognate sense. They take as it were their colour from each other, that is, the more general is restricted to a sense analogous to a less general."

He therefore submitted that applying the maxim *noscitur a sociis,* the words 'shares, stock, bonds, notes (other than promissory notes), debenture, debenture stock, units under a unit trust scheme and 'shares in an oil royalty' under the definition of securities in s. 2 of the ECA all share a number of common characteristics or denominatiors and therefore form a group of cognate terms.

Debentures under s. 2 of the ECA are financial debt instruments. They are not one-off instruments and they are issued to the public. A banking type of debenture is a one-off instrument and is never issued to the public. Debentures under s. 2 of the ECA are transferable by delivery or by transfer of registration. Identity of the holders will change from time to time. Most importantly is that it can be traded. The banking type of debenture is not transferable and is not capable of being traded. It is created in favour of a single trader, whose identity remains the same.

I agree the expression debenture in the definition of securities in s. 2 of the ECA must share these common characteristics or denominators. The debenture here is in reference to a type of debt instrument issued by the companies in multiples to the public to raise capital registerable in the Register of Debenture under Division 4 of Part IV of the CA and not to a banking debenture containing a fixed and floating charge.

The debenture dated 20 February 1997 created by the plaintiff in favour of the 2nd defendant as a security agent and trustee for the 1st defendant is clearly a banking type of debenture. It does not come within the ambit of s. 11 or any other provisions of part IV of the ECA. In *Banque Nasionale de Paris v. Wuan Swee May* [2000] 4 CLJ 387, the court noted that s. 11 of the ECA relates to issuance of security and subsequently held that the transfer of shares to the nominees in and outside Malaysia as security for the loan did not fall within the meaning of "to issue" securities.

Learned counsel for defendant invited the court to refer to the Hansard of the second reading of the Exchange Control Bill 1953 and apply a purposive approach in interpreting the intention of Parliament. The court recognizes this approach in *Chor Paik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285. It refers to dealings in gold and securities. "Dealings" envisages securities of the kind that are transferable and tradeable. In the context of debentures, it refers to debentures that are debt instruments issued under the CA, ones that are issued to the public and are commonly used to raise capital. It does not refer to the fixed or floating charge variety taken by banks as security.

From the Hansard, it is clear that the purpose behind the enactment of the ECA was to control movement of currency, gold and other financial instruments as between scheduled territories. It was not aimed at banking securities since they could neither be transferred nor traded.

I noted, none of the sections in Part IV of the ECA are applicable to Banking securities. Section 11 refers to the 'issue' of securities. It cannot therefore refer to fixed and floating charges since they are not issued. They are instead 'created'. Sections 12 and 13 deal with registered securities, coupons and bearer certificates that are transferable in nature. Section 17 refers to restrictions relating to the transfer of securities held by a nominee. A nominee cannot hold a Banking type of security. Sections 18 and 19 refer to restrictions relating to the deposit of certificates of title to securities. These provisions, learned counsel for defendant contended, are applicable to and can only relate to transferable instruments and not to security created as collateral for a loan.

The Hansard further states: "Clauses 18 and 19. These clauses extend Exchange Control to cover bearer securities and certain other securities, which, by the fact that they can be transferred without the transaction being transferred in the Federation, have proved a weak link in Exchange Control." Here, again the emphasis is transferability of the instruments. Banking type debentures containing fixed or floating charges are one-off and issued to a single holder and to reiterate again they are non-transferable and not capable of being traded.

The Exchange Control (Deposit of Securities) Order 1973 encompasses securities which are registered and on which dividends and interest are payable. Security of the nature of a banking type debenture with a fixed/floating charge granted as collateral for a loan would not fall within the ambit of this order.

The defendants had effectively argued and had shown that the Security Documents do not come within the definition of securities as envisaged under s. 2 of the ECA. It follows that s. 11 of the ECA is not applicable. The Hansard of the ECA Bill makes it clear that the purpose behind the enactment of the ECA was to control movement of currency, gold and other financial instruments as between scheduled territories. It relates to securities which are issued, transferable and tradeable. It was not aimed at banking securities since they are one-off instruments which can neither be transferred nor traded. I am satisfied and so hold that the approval of BNM is not required in relation to the Security Documents executed by the plaintiff.

For the above reasons I allowed the defendants' appeal and struck out the suit by the plaintiff.